

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0306, In re Juvenile 2006-0306, the court on March 14, 2007, issued the following order:

The parents of Juvenile 2006-0306 appeal a decree of the probate court granting a petition of the division for children, youth and families (DCYF) to terminate their parental rights. The father contends the probate court erred by: (1) granting the petition on the ground that he failed to correct conditions leading to a finding of neglect, see RSA 170-C:5, III (Supp. 2006), when he was not responsible for the neglect; (2) allowing him only thirty-seven days following a hearing under In re Bill F., 145 N.H. 267 (2000), to correct the conditions; (3) disregarding testimony of the State's expert witness; and (4) taking into consideration noncompliance with orders issued prior to the Bill F. hearing and his failure to seek reconsideration of, or appeal, the district court's orders. The mother argues: (1) she complied with the dispositional orders; (2) the dispositional orders were unclear; (3) the probate court improperly considered evidence that she left the state while the proceedings were pending; and (4) the court disregarded testimony that she complied with the orders and that termination would not be in the best interest of the child. We affirm.

Before the probate court may decree the termination of parental rights, the court must find that the petitioner proved one of the grounds for termination under RSA 170-C:5 beyond a reasonable doubt. See In re Juvenile 2003-195, 150 N.H. 644, 648 (2004). Once the court has made this finding, it must consider whether terminating the parental relationship is in the best interest of the child. See id. We will not disturb the decree unless it is unsupported by the record or plainly erroneous, bearing in mind that it is not our role to weigh the evidence. See In re Antonio W., 147 N.H. 408, 412 (2002); In re Craig T., 144 N.H. 584, 585 (1999). We conclude that the probate court's decree in this case was neither unsupported by the record nor plainly erroneous.

The father first argues that because the finding of abuse was based upon conduct of a third party while the child was in the mother's sole custody, conduct for which the father bore no culpability, the probate court erred as a matter of law in terminating his rights pursuant to RSA 170-C:5, III. We disagree. The focus of RSA 170-C:5, III is upon whether the parents have corrected conditions that led to the finding of child abuse or neglect, irrespective of whether the parent had custody of the child at the time of the abuse or was responsible for the specific circumstances that prompted the abuse or neglect proceedings in the first instance. See In re Tricia H., 126 N.H. 418, 422-23 (1985). The probate court found that the condition leading to the

finding of neglect was the personality deficits of both parents that rendered them unfit to care for the child's safety, and that neither parent corrected such deficits despite efforts by DCYF to assist them in doing so. As to the father, this finding was not erroneous as a matter of law.

We likewise reject the father's arguments that the probate court unsustainably exercised its discretion by allowing him only thirty-seven days after the Bill F. hearing to correct the conditions leading to the finding of neglect, and by considering whether he complied with dispositional orders issued prior to the Bill F. hearing. In Bill F., we held that due process requires the district court, in an abuse or neglect proceeding, to provide, upon request, a hearing to address a non-custodial parent's ability to obtain custody. See Bill F., 145 N.H. at 274. The non-custodial parent's right to such a hearing is an issue separate and distinct from the issue of whether the non-custodial parent corrected conditions leading to the finding of neglect so as to defeat a petition to terminate his or her parental rights. See id. at 273.

Although the father asserts that he had no notice his parenting skills were deficient until the Bill F. hearing, the record indicates that the district court's dispositional orders pertained to the father and articulated measures he was to implement, and that the father directly participated in the district court proceedings. The record further indicates that the father was given more than a year to comply with the dispositional orders and to correct the conditions leading to the neglect finding in accordance with RSA 170-C:5, III. The court was not obligated to provide an additional year after the Bill F. hearing.

With respect to the father's contention that the probate court failed to consider testimony of DCYF's expert who opined that the father's rights should not be terminated, we note that it was within the probate court's discretion to weigh this testimony. See In re Samantha L., 145 N.H. 408, 414 (2000). It is clear from the record that the probate court acted well within its broad discretion by considering the expert's testimony, posing appropriate follow-up questions, and assigning the testimony the weight the probate court deemed appropriate.

Nor do we agree with the father that the probate court acted outside of its discretion by observing that neither he nor the mother sought reconsideration of, or appealed, the district court's orders, even though the father was not represented by counsel for much of this period. We note that the court made this observation in three lines of an order spanning twenty-one pages, and that the observation appears nowhere in the court's legal analysis. In view of the parents' complaint that the district court's orders were ambiguous and the father's testimony that he believed the orders were optional, the inclusion of this observation in the decree was a sustainable exercise of discretion.

We turn next to the mother's arguments that she complied fully with the district court's dispositional orders and, alternatively, that if she did not comply, her noncompliance was due to a purported lack of clarity in the orders. As a preliminary matter, we note that although the mother included the district court's dispositional findings of fact and orders in her appendix, the parties have not submitted the case plan, the parenting capacity evaluation of the mother, or any of the orders associated with the district court's review hearings. Inasmuch as it was the mother's burden to supply a record sufficient to review the questions she is raising on appeal, see Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004), we review these issues to the extent the record will allow us to do so, and assume the probate court's decree accurately describes the content of orders and documents that have not been submitted on appeal, see id.

The dispositional orders required the mother, inter alia, to undergo a parenting capacity evaluation and follow any recommendations following the evaluation, to attend parenting classes, to learn age appropriate supervision, parenting, and discipline skills, and to meaningfully work with DCYF and follow its recommendations. According to the probate court, the parenting capacity evaluation diagnosed the mother with moderate personality disorder having narcissistic features such that she tends to minimize her responsibility for problems and exercise poor judgment, and recommended that she participate in regular psychotherapy, parenting courses and groups, and supervised visitation.

In finding the mother not to be in compliance with the dispositional orders, the district court, according to the probate court, noted that she: (1) missed certain visits when she left the area for one week without notifying DCYF; (2) had allowed a male roommate to be present during at least one visit, contrary to the visitation requirements; and (3) had moved to Virginia between September 2004 and January 2005, thus ceasing visitations and counseling, and had not attended review hearings in the district court. The probate court found that during the period when the mother was in Virginia, she exercised only one visitation, and although she scheduled bi-weekly phone calls with the child, she was not always available to receive the calls. Subsequent to returning to New Hampshire on January 4, 2005, the probate court found the mother did not seek to renew visitations with the child until January 21, 2005, and did not renew counseling until March 3, 2005, shortly before the permanency hearing.

Although the orders may not have specified what parenting skills the mother was to learn, or how many counseling sessions she was to attend, they were sufficiently clear to put her on notice that she was to cooperate in good faith with DCYF to address her personality deficits that had placed the child in danger in the first instance. The probate court specifically found the mother's testimony not credible, concluding that "she operates in a world that looks to fulfilling her desires first," and noting that even in her trial testimony she tried to minimize her own role in having initially placed the child in abusive circumstances. On

this record, we conclude the probate court sustainably found that the mother failed to correct the conditions leading to neglect despite reasonable efforts by DCYF to rectify the conditions, and we reject the mother's argument that the district court's orders were not sufficiently clear. In light of testimony establishing that DCYF cautioned the mother against moving from the state, we likewise reject her argument that the probate court should not have considered the move because she believed the case would be transferred.

Lastly, we reject the mother's arguments that the probate court disregarded testimony by DCYF that she was in compliance with the dispositional orders, and testimony that termination of her parental rights would not be in the child's best interest. Even assuming there was testimony favorable to the mother on these issues, it was within the probate court's discretion to assign such weight to the evidence as it deemed appropriate, see Craig T., 144 N.H. at 585, and the record supports the probate court's ultimate findings.

Affirmed.

Broderick, C.J., and Duggan and Hicks, JJ., concurred.

**Eileen Fox,
Clerk**